

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 15 May 2006

BALCA Case No.: 2005-INA-119
ETA Case No.: P2004-NJ-02507524

In the Matter of:

DAVIS ASSOCIATES DESIGN, INC.,
Employer,

on behalf of

ANDERSON CAMPOS DE SOUZA,
Alien.

Appearance: Cassandre C. Lamarre, Esq., Newark, New Jersey
 Davis Santiago, President, Park Ridge, New Jersey¹
 For the Employer

Certifying Officer: Dolores DeHaan
 New York, New York

Before: **Burke, Chapman, and Vittone**
 Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of its application for labor certification. Permanent alien labor certification is governed by Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R.").² We base our decision on the record upon which the CO denied

¹ Although "Cassandre C. Lamarre, Esq." entered an appearance on behalf of the Employer and the Alien while the case was pending before the CO, (AF 87), the rebuttal and Request for Review were filed by Davis Santiago, President (AF 32, 1-2).

² This application was filed prior to the effective date of the "PERM" regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal

certification and the Employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On January 18, 2002, the Employer, Davis Associates Design, Inc., filed an application for labor certification to enable the Alien, Anderson Campos De Souza, to fill the position of "Decorative Painter" (AF 69). The Employer set forth a basic pay rate of \$22.00 per hour and a work week of 40 hours, 8:00 a.m. to 4:00 p.m. The address at which the Alien would work was listed as: "Different job sites all over NJ, PA, NY" (AF 69). The primary job requirement stated on the application was three years of experience in the job offered (AF 69, Item 14). In addition, the Employer stated as a special requirement: "Travels at own expense in State where he lives. Out of State jobs, travel expenses are paid by Employer" (AF 69, Item 15). The application was submitted under the reduction in recruitment ("RIR") process (AF 59).

On October 13, 2004, the CO issued a Notice of Findings ("NOF") in which she approved the Employer's request for RIR processing, but proposed to deny certification on the grounds, *inter alia*, that the Employer had not established that the job-opportunity meets the definition of "Employment" as set forth in Section 656.3, that the Employer did not document that there is a *bona fide*, permanent, full-time year-round position for an employee other than oneself, and that the Employer did not document that the job opportunity has been and is clearly open to any qualified U.S. worker under Section 656.20(c)(8) (AF 57-58).

The Employer submitted its rebuttal on November 9, 2004 (AF 32-56). However, in the Final Determination dated December 10, 2004, the CO found the rebuttal to be unpersuasive and denied certification (AF 30-31).

On or about December 16, 2005, the Employer requested a review of the denial (AF 1-29). Subsequently, this matter was forwarded to the Board of Alien Labor Certification Appeals ("Board"). On April 20, 2005, we issued a Notice of Docketing and Order Requiring Statement

of Position or Legal Brief. Although the Employer did not respond thereto, the grounds for the appeal are set forth in the request for review.

DISCUSSION

In the NOF, the CO cited applicable regulations, as set forth above, and stated in pertinent part:

We have been unable to find a listing for the employer or for the telephone number in items 5 of the 7-50A form, which was also the number used in employer's advertising. We tried to find a listing covering the date the ads ran, December 2001, as well as currently, but the company is not listed in the Bergen County telephone directories of April 2001, June 2002, August 2003 and August 2004. We checked on the internet (anywho.com) in April and October, 2004 but found no listing for the telephone number in item 5 of the 7-50A form, 201-505-0395, or for the company.

Employer must document that it is currently operational and where the business is actually located as well as its business telephone number. Such documentation must include tax statements, rental receipts, business advertising, telephone bills etc as evidence of its location and to whom the telephone number on the 7-50A form is assigned. Employer must also explain why the firm is not listed in the telephone directories. If there is a listing, furnish a copy of same and identify the source and its date. How do prospective customers know of firm's operations?

Employer must also fully document the nature of its business activities, the number of workers it has in 2001, 2002, 2003 and currently, their names and job duties, whether full- or part-time, employee or non-employee. Furnish copies of W-2 or 1099-MISC forms, whichever are applicable, for 2001, 2002 and 2003. He must also submit signed copies of its Federal Income Tax returns for 2001, 2002 and 2003. Employer must document how he can guarantee permanent full-time employment performing the job duties shown on the 7-50A form, which consist solely of decorative painting, by furnishing copies of contracts, invoices etc for 2002, 2003 and currently.

(AF 58).

The Employer's rebuttal consisted of a letter dated November 9, 2004, signed by Davis Santiago, President (AF 32), unsigned copies of the Employer's Federal Income Tax returns for 2001, 2002 and 2003 (AF 33-44), a Fleet Bank Small Business Statement (AF 45-50), Form 1099-MISC statements for 2001, 2002, and 2003 (AF 51-54), and a Sprint telephone bill (AF

55).

In the Final Determination, the CO concluded that the documentation provided by the Employer in its rebuttal was inadequate, stating in pertinent part:

We have reviewed employer's rebuttal of November 9, 2004 and its enclosures. He has not documented the nature of its business operations and has not furnished the number of workers he has had in 2001, 2002, 2003 and currently, their names and job duties, whether full or part-time, employee or non-employee, as instructed in the NOF. He has submitted copies of 1099 MISC forms for 2001, 2002 and 2003 for one worker, [Mr.] Sousa [sic], showing that Nonemployee Compensation was paid to him for each of those three years. The rebuttal includes unsigned copies of company Federal Income Tax returns for 2001, 2002 and 2003. We note these returns do not include any amounts for Salaries and Wages (item 8) or for Cost of labor (Schedule A form, item 3) for any of the three years. The employer's tax returns describe its Business activity as "Building" and its Product or service as "Design" (Schedule B, item 2), while item 8 of the 7-50A form states "Decorating Paint Company." The Notice of Findings asked employer to document that he can guarantee permanent full-time employment performing the required job duties by furnishing copies of contracts, invoices etc for the performance of those duties for 2002, 2003 and currently. The rebuttal states "I do not have contracts for my work."

Since the employer has not furnished all of the documentation requested in the Notice of Findings, and the documentation he did submit is not sufficient, he has failed to satisfactorily document that he can guarantee permanent full-time position performing the required job duties by an employee other than oneself and that a bona fide permanent full time position existed to which U.S. workers could be referred if available. The application is denied.

(AF 31). We agree.

The requirement of a bona fide job opportunity arises out of section 656.20(c)(8), which requires an employer to attest that the "job opportunity has been and is clearly open to any qualified U.S. worker." *Pasadena Typewriter and Adding Machine Co., Inc. and Alireza Rahmaty v. United States Department of Labor*, No. CV 83-5516-AAH(T) (C.D. Cal. Mar. 26, 1984) (unpublished Order Adopting Report and Recommendations of Magistrate) (the job must truly exist and not merely exist on paper). The employer has the burden of providing clear evidence that a valid employment relationship exists, and that a *bona fide* job opportunity is available to domestic workers, and that the Employer has, in good faith, sought to fill the position with a U.S. worker." *Amger Corp.*, 1987-INA-545 (Oct. 15, 1987) (*en banc*) (adopting

Pasadena Typewriter); *Modular Container Systems, Inc.*, 1989-INA-228 (July 16, 1991) (*en banc*).

It is well-settled that the employer bears the burden of proof in certification applications. 20 CFR § 656.2(b); *see Giaquinto Family Restaurant*, 1996-INA-64 (May 15, 1997). As outlined above, the CO reasonably requested relevant information in the NOF in order to ascertain whether there is a *bona fide* permanent full-time job opportunity for the position of “Decorative Painter” within the setting of the Employer’s business and to document that such a job opportunity, if it truly exists, is clearly open to qualified U.S. workers.

As stated by the CO, despite her explicit instructions in the NOF, the Employer’s rebuttal did not include the number of workers it had in 2001, 2002, 2003 and currently, their names and job duties, whether full or part-time, employee or non-employee. Furthermore, the Employer did not furnish any W-2s. In fact, the only 1099 MISC forms are those of the Alien. Moreover, as stated by the CO, the Employer’s unsigned Federal Tax returns tend to undermine its assertion that there is a *bona fide*, full-time job available, since the tax returns list no salaries or wages (AF 33, 37, 41).

The Board has consistently held that a petitioning employer must provide directly relevant and reasonably obtainable documentation requested by a CO. *See, e.g., Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*); *Kogan & Moore Architects, Inc.*, 1990-INA-466 (May 10, 1991); *Bob’s Chevron*, 1993-INA-498 (May 31, 1994). Since the Employer has failed to provide such documentation, we find that labor certification was properly denied.³

³ With the request for review, the Employer’s President belatedly submitted a copy of his business card indicating the nature of the Employer’s business (AF 3), and provided *signed* copies of the Employer’s tax returns (AF 4-15), an “Employee list” for 2001, 2002 and 2003 (AF 16), and a few “proposals” (*i.e.*, bids) (AF 17-22). However, it is well settled that evidence submitted after the issuance of the Final Determination cannot be considered on appeal pursuant to 20 C.F.R. §656.27(c). *See, e.g., Import S.H.K. Enterprises, Inc.*, 1988-INA-52 (Feb. 21, 1989) (*en banc*). Moreover, even if the Employer had submitted the documentation with its rebuttal, we would find it is inadequate, since the Employer has still not documented the need for a full-time, decorative painter. To the contrary, the Employer identified “[Mr.] Souza” as one of only two or three people on the “Employee List” for 2001, 2002, and 2003 (AF 16). However, the Employer’s Federal tax returns and 1099-MISC forms indicate that “[Mr.] Souza” is a non-employee (AF 33, 37, 41, 51-54). Furthermore, the Employer still failed to provide W-2s, 1099-MISC forms, or any information regarding the status or duties of the other “employees.” (AF 16). Finally, the reported earnings of “[Mr.] Souza” in 2001, 2002, and 2003 were \$3,675, \$12,147, and \$12,147, respectively (AF 51-54). Based on the stated basic pay rate of \$22.00 per hour for 40 hours (AF 69), a *full-time* decorative painter would have had an annual income of \$45,760.00.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.